(7)

92-357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Petitioners,

v.

WILLIAM BARR, et al.,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

APPELLANTS' BRIEF ON THE MERITS

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JURISDICTIONAL STATEMENT FILED AUG. 25,1992
PROBABLE JURISDICTION NOTED DEC. 7, 1992

92-PP

QUESTION PRESENTED

I.

WHETHER A STATE LEGISLATURE'S INTENT TO COMPLY WITH THE VOTING RIGHTS ACT AND THE ATTORNEY GENERAL'S INTERPRETATION THEREOF PRECLUDES A FINDING THAT THE LEGISLATURE'S CONGRESSIONAL REDISTRICTING PLAN WAS ADOPTED WITH INVIDIOUS DISCRIMINATORY INTENT WHERE THE LEGISLATURE DID NOT ACCEDE TO THE PLAN SUGGESTED BY THE ATTORNEY GENERAL BUT INSTEAD DEVELOPED ITS OWN.

LISTING OF ADDITIONAL PARTIES

APPELLANTS

MELVIN G. SHIMM, ROBINSON O. EVERETT, JAMES M. EVERETT, and DOROTHY G. BULLOCK.

APPELLEES

JOHN DUNNE, Assistant Attorney General of the United States, in charge of the Civil Rights Division; JAMES G. MARTIN, Governor of the State of North Carolina; JAMES GARDNER, Lieutenant Governor for the State of North Carolina; DANIEL T. BLUE, JR., Speaker of the North Carolina House of Representatives; RUFUS L. EDMISTEN, Secretary of the State of North Carolina; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; M.H. HOOD ELLIS, Chairman of the North Carolina State Board of Elections; GREGG O. ALLEN, WILLIAM A. MARSH, JR., RUTH TURNER, and JUNE K. YOUNGBLOOD, in their official capacities as members of the North Carolina Board of Elections.

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OPINIONS BELOW

On August 7, 1992, the Memorandum Opinion of the three-judge court was filed in the United States District Court for the Eastern District of North Carolina in Shaw v. Barr, (Case No. 92-202-CIV-5-BR). This Opinion is set out in the Appendix to the

Jurisdictional Statement (at pp. 1a-25a),[1] together with the Concurring and Dissenting Opinion of Judge Voorhees (Id. at 27a-63a.)

JURISDICTION

The Order appealed from was filed on April 27, 1992 and the Notice of Appeal from this Order was filed on May 27, 1992. (See Appendix to Jurisdictional Statement at 61a-66a). This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises under:

(a) Article I, Section 2 of the Constitution of the United States, which provides in pertinent part:

> The House of Representatives shall be composed of members chosen in every second year by the people of the several states; . . . .

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[1] The Appendix to the Jurisdictional Statement is cited herein as "J.S. App."

(b) Article I, Section 4 of the Constitution of the United States, which provides in pertinent part:

> The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

(c) Section I of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;

(d) the Fifteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of

servitude.

(e) Title 42, Section 1973b of the United States Code, which provides in pertinent part:

> A violation of subsection (a) is established if, based on the totality of circumstances it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a), and that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(f) Title 42, § 1973l(b), which provides in pertinent part:

> No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 1973g of this title shall have jurisdiction

> to issue any declaratory judgment pursuant to section 1973(b) or 1973(c) of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of subchapters I-A to I-C of this chapter or any action of any Federal officer or employee pursuant hereto.

(g) Chapter 7 of the 1991 Extra Session Laws of North Carolina (hereinafter "Chapter 7"), the challenged congressional redistricting statute, which amends the North Carolina Elections Code, Chapter 163, Article 17 of the North Carolina General Statutes. Chapter 7 is reprinted as Exhibit 2 in the appendix to the jurisdictional statement filed by the appellants in this Court in Pope v. Blue, (No. 91-2038), in which the judgment of the lower court was summarily affirmed, 112 S.Ct. 30 (Oct. 5, 1992). Immediately after Chapter 7, which appears on pages 62a-132a of that Appendix, are maps of the twelve congressional districts (pages 133a-145a).

Ten copies of that jurisdictional statement have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

As a result of population increases reflected in the 1990 Decennial Census, North Carolina became entitled to a twelfth seat in the United States House of Representatives. Accordingly, on July 9, 1991, the General Assembly of North Carolina enacted legislation whereunder the State would be redistricted into twelve Congressional Districts. Under this redistricting plan one district, the First District, had a majority of black persons of voting age and of black persons registered to vote. This proposed majority-minority district was in the northeastern part of the State. (J.S. App. at 2a).

Because 40 of the State's 100 counties

are covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973b, the General Assembly submitted this redistricting plan for preclearance by the Attorney General of the United States pursuant to 42 U.S.C. § 1973c. By letter of December 18, 1991,[2] Assistant Attorney General Dunne, interposed a formal objection to the plan because "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state". (J.S. App. at 3a). According to this letter, it appeared that the General Assembly "chose not to

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[2] This letter, from which the lower court quoted extensively, is reprinted at pp. 54a-61a of the appendix to the jurisdictional statement filed by appellants in Pope v. Blue, (No. 91-2038); and ten copies of that jurisdictional statement have been lodged with the Clerk of Court.

give effect to black and Native-American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state." (J.S. App. at 3a-4a). Appellee Dunne also remarked that the General Assembly

> was well aware of significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature.... These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to

> be pretextual reasons.

J.S. App. at 4a.

In response to the Attorney General's objection to its first redistricting plan, the General Assembly on January 24, 1992, enacted new redistricting legislation which created a second majority-minority district, the Twelfth District. The majority opinion in the court below comments that this district is

> in a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across Piedmont North Carolina from Durham to Gastonia. As a result of the tortured configuration of the Twelfth District and other features of the Plan, many precincts, counties, and towns in North Carolina are divided among two or even three congressional districts.

(J.S. App. 4a-5a).

According to the dissent in the Court below,

> the General Assembly's second

> redistricting plan has resulted in a First District map which looks like a Rorschach ink-blot test and in a serpentine Twelfth District that slinks down the Interstate Highway 85 corridor until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters.

(J.S. App. at 37a)

. . . . . .

> [T]he Voting Rights Act has been used to create minority-leveraged congressional districts so devoid of shape, both in absolute terms and in terms of traditional North Carolina districts, and so "uncouth" and "bizarre" in configuration, as to invite ridicule. See, e.g., "Political Pornography - II," Wall St. J., Feb. 4, 1992, ... (describing North Carolina's new congressional district map as "political pornography" and "computer-generated pornography"); "Review & Outlook: Political Pornography," Wall St. J., Sept. 9, 1991, ... To know this, one may simply inspect their computer-drafted labyrinthine convolutions superimposed upon a map of North Carolina.

(J.S. App. at 56a - 57a) [3]

After the second redistricting plan had been precleared by the Attorney General, the Republican Party of North Carolina and various other plaintiffs filed a suit complaining of political gerrymandering. However, this action was dismissed by a three-judge district court; and, upon appeal, that judgment was summarily affirmed by this Court. Pope v. Blue, No. 3:92CV71-P ___F.Supp.___, 1992 WL 378742 (W.D.N.C. April 16, 1992), affirmed, 112 S.Ct. 30 (October 5, 1992).

On March 12, 1992 the five Plaintiff-Appellants sued in the Eastern District of

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[3] North Carolina's Twelfth Congressional District also is discussed by George Will in his recent book, Restoration, (at pp. 40-50 (1992)). His book also has maps of the almost equally grotesque congressional districts which have been created in Illinois, Florida, and Texas in order to implement "cagetorical representation". (Ibid.)

North Carolina to enjoin permanently the implementation of the redistricting plan and for other related relief. (J.S. App. at 5a, 95a - 99a, 104a - 105a). Unlike the action filed previously by the Republican Party, Appellants did not allege political gerrymandering; instead they claimed that there had been racial gerrymandering.

According to their complaint, as amended, all five Appellants are registered voters in Durham County, North Carolina; and under the 1992 redistricting plan two of them -- Shaw and Shimm -- will vote in the Twelfth Congressional District and the other three in the Second District. ¶ 5 (J.S. App. at 73a).[4] Appellants asserted

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[4] The majority opinion in the court below recites that "Plaintiff James Everett, also a resident of Durham County... will vote in the Twelfth District." Appellants are unaware of the basis for this statement, which is contrary to the allegations of the Complaint, (J.S. App. at 73a) and also is factually incorrect. However, this error does not

that, as a condition for preclearance under the Voting Rights Act, the Attorney General had required the General Assembly of North Carolina to "create two Congressional Districts containing a majority of black persons and voters" ¶ 16 (J.S. App. at 79a). This requirement was imposed in order "to assure the election of minority persons as members of Congress from those districts" ¶ 23 (J.S. App. at 85a) and "to meet a racial quota for representation of the State of North Carolina in the United States House of Representatives." ¶ 28 (J.S. App. at 88a).

According to the complaint, the General Assembly initially had refused to comply with the Attorney General's requirement that it "create two Congressional Districts in which a majority

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appear to be material for purposes of this appeal.

of black voters was concentrated arbitrarily -- without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions"; but ultimately "a decision [was] made with full awareness of the intended consequences and effects and was made with the purpose, shared with Defendants Barr and Dunne, to create Congressional Districts along racial lines and to assure that black members of Congress would be elected from two Congressional Districts in which a majority of black voters were intentionally and purposefully concentrated on the basis of census data reflecting the racial composition of North Carolina's population." ¶ 36(A) (J.S. App. 102a - 103a).

The Complaint claimed that, in imposing the requirement of two majority-

minority districts, the Attorney General had misinterpreted the Voting Rights Act and, as a consequence had violated Appellants' constitutional rights "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters." ¶ 29 (J.S. App. at 90a). More specifically, they alleged:

> With respect to the acts of Defendants Barr and Dunne, the rights infringed are those granted expressly or implicitly by Article I, Secs. 2 and 4 and Article 4, Sec. 2, Clause 1, of the United States Constitution, by the due process clause of the Fifth Amendment, and by the Fifteenth Amendment. With respect to the acts of the State Defendants, the rights infringed are those granted expressly or implicitly by Article I, Secs. 2 and 4, of the United States Constitution and by the Fourteenth and Fifteenth Amendments.

Preliminary Statement

in the Complaint
(J.S. App. at 70a).

All the Defendants filed motions to dismiss. After considering briefs and hearing oral arguments, the three-judge court ruled that it lacked jurisdiction over the federal Defendants because of the preclusion provisions in Sec. 14(b) of the Voting Rights Act, 42 U.S.C. § 1973l(b), and also, that the complaint had failed to state a cognizable claim for relief against them. Likewise, the Court held that Appellants had failed to state any valid claim against the State Defendants.

Appellants gave timely notice of appeal and then filed their Jurisdictional Statement, which posed five questions. In turn, on December 7, 1992 this Court noted probable jurisdiction and specified a question to be briefed by the parties.

SUMMARY OF ARGUMENT

The Attorney General refused to grant preclearance under Section 5 of the Voting Rights Act unless the North Carolina Legislature created two majority-minority congressional districts. In doing so, his focus was solely on race; and all other factors, such as compactness, contiguousness, community of interest, and the boundaries of governmental subdivisions were deliberately ignored. Thereafter, in order to obtain preclearance from the Attorney General, the North Carolina General Assembly was equally "race-conscious" in adopting its second redistricting plan, which created two convoluted majority-minority districts.

In attempting to justify this plan, the State Appellees and the three-judge District Court relied especially on United Jewish Organizations v. Carey, 430 U.S. 144

(1977) (hereafter U.J.O.). According to their interpretation of U.J.O., the Voting Rights Act authorizes the creation of majority-minority districts. Moreover, this racial discrimination is benign and therefore is permitted under the Fourteenth and the Fifteenth Amendments.

If this interpretation is correct, U.J.O. is inconsistent with two lines of precedent from this Court. The first line is formed by decisions which apply the one-person, one-vote principle and treat the right to vote as a personal right, rather than a group right. The second line is composed of decisions which stand for the principle that the "Constitution is color-blind."

The lower court seemed to believe that, under U.J.O., the racial discrimination involved in creating two majority-minority districts must be

presumed to be benign because 40 counties in North Carolina are subject to Section 5 of the Voting Rights Act. This interpretation of U.J.O. not only runs counter to the Court's insistence on strict scrutiny of racial quotas, but also gives the Voting Rights Act an effect never intended by Congress.

When strict scrutiny -- indeed, any scrutiny -- is given to the redistricting plan, the two majority-minority districts are found to be constitutionally wanting. No court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina. Indeed, it is clear that none has taken place; and so there was no constitutional violation to be remedied by establishing two majority-minority districts.

The State Appellees and the court

below apparently interpreted U.J.O. to mean that the General Assembly did not adopt its second redistricting plan with "invidious" discriminatory intent, because its plan was intended to satisfy the Attorney General's requirements for preclearance. However, in view of the "purposeful" nature of the General Assembly's conduct, its racially discriminatory intent was "invidious". To hold otherwise would open the door for the Attorney General and state legislatures to violate flagrantly the voting rights of American citizens. Under the circumstances of this case, their version of the "Nuremberg defense" does not aid the State Appellees.

ARGUMENT

I. IN CONGRESSIONAL REDISTRICTING BENIGN RACIAL DISCRIMINATION IS A CONSTITUTIONAL OXYMORON.

Appellants alleged that North Carolina's two majority-minority districts

were created in order to assure that a black member of Congress would be elected from each district (J.S. App. at 79a, 85a, 88a, 89a, 93a, 102a). These allegations have never been contested by any of the Appellees; and, as recognized by the court below, they are "entitled to acceptance as a procedural matter" (J.S. App. at 18a). Thus, in this case no issue arises as to which party bears the burden of proving why the majority-minority districts were created.

Instead, the first question to be confronted on this appeal is whether the creation of two majority-minority congressional districts was per se unconstitutional when the purpose for creating them was to fill a racial quota for electing members of the United States House of Representatives. Whatever may be implied to the contrary by the plurality

opinion in U.J.O., see 430 U.S. at 161, two lines of this Court's precedent dictate an affirmative answer to this question.

A. The Majority-Minority Districts Are Inconsistent with the Principle of "One Person, One Vote".

Soon after Baker v. Carr, 369 U.S. 186 (1962), this Court held the Georgia county unit system unconstitutional, Gray v. Sanders, 372 U.S. 368 (1963); and, in doing so, it observed:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote -- whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when

> he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

Id. at 379-380.

. . . . . .

> [T]here is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.

Id. at 381.

. . . . . .

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.

Id. at 376. [5]

Subsequently, in considering the requirements for congressional redistricting, the Court held that

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[5] Id. at 376. (See also Chisom v. Roemer, 111 S.Ct. 2354 (1991) where, in footnote 31 of its opinion, the majority quotes approvingly from Gray v. Sanders.)

"construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." See Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). The Court also emphasized:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Id. at 17-18. (Emphasis supplied)

In Reynolds v. Sims, 377 U.S. 533 (1964), the Supreme Court upheld a claim that the Equal Protection Clause required application of the "one-person, one-vote"

standard to the election of state legislators. While recognizing that Wesberry had been based on Art. I, Sec. 2 of the Constitution, rather than on the Fourteenth Amendment, the Court observed:

> Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Id. at 560-561. (Emphasis added)

The court also pointed out:

> A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in United States v. Bathgate, 246 US 220, 227, 52 L ed 676, 680, 38 S Ct 269, "[t]he right to vote is personal . . ."

Id. at 561.

. . . . .

> Almost a century ago, in Yick Wo v. Hopkins, 118 US 356, 30 L ed 220, the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." ...
>
> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id. at 562.

In a comment seldom quoted but especially relevant to the present case, the Court also stated:

> Furthermore. the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone. (Emphasis supplied)

Id. at 568.

Although the court below was of the view that Article I, Section 2 has no relevance to racial gerrymandering, (J.S. App. at 15a-16a), the language of Wesberry, as explained and applied in Reynolds, leads to a contrary conclusion. The "fundamental principle of representative government" established in Wesberry does not permit consideration of group rights based on race, sex, or economic status. To use race as the criterion for picking the congressional districts into which Appellants and other registered voters would be placed -- as was done by the General Assembly at the instance of the Attorney General -- is totally inconsistent with that "fundamental principle".

Reynolds emphasizes that the right to vote is "individual and personal in nature". This leaves no room for the

"categorical representation" approach employed by the Attorney General, whereunder various minority groups are considered to be entitled to elect someone to Congress who is a member of their group.[6]

Finally, if the Alabama legislative districts, which "presented little more than crazy quilts, completely lacking in rationality", "could be found invalid on

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[6] In Wells v. Rockefeller, 394 U.S. 542 (1969), the Court rejected a group rights approach to congressional redistricting in New York. There the Court ruled that New York could not justify "its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact. ... To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be over-represented at the expense of districts with different orientations." Id. at 546. Insofar as equal protection is concerned, a "group rights" approach also conflicts with this statement in Shelley v. Kraemer, 334 U.S. 1, 22 (1948): "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

that basis alone", there can be no justification for the "political pornography" in North Carolina, which irrationally created the "serpentine" Twelfth Congressional District and other monstrosities.

B. Our "Color-Blind" Constitution Prohibits Creation of Majority-Minority Districts for the Purpose of Filling Racial Quotas in Congress.

The creation of majority-minority congressional districts in order to elect a quota of minority persons to Congress also is inconsistent with this Court's line of decisions invalidating racial barriers because they violated the Fourteenth and Fifteenth Amendments. These decisions flow naturally from Justice Harlan's pronouncement almost a century ago that our "Constitution is color-blind" and that the post-Civil War amendments had "removed the race line from our governmental systems"

see, Plessy v. Ferguson, 163 U.S. 537, 555, 559 (1896), (Harlan, J. dissenting). For example, the Equal Protection Clause was relied on in Brown v. Board of Education, 347 U.S. 483 (1954), where a unanimous Court outlawed de jure school segregation; Reitman v. Mulkey 387 U.S. 369 (1967), which overturned California's constitutional provision allowing a property owner to consider the race of a buyer or lessee; and Anderson v. Martin, 375 U.S. 399 (1964), which invalidated a statute requiring the designation of a candidate's race on the ballot.

The Court cited the Fifteenth Amendment in setting aside a state law which had changed the municipal boundaries of Tuskegee, Alabama, so that all but four or five of the city's 400 black voters were placed outside the city limits. Gomillion v. Lightfoot, 364 U.S. 339 (1960). The

legislation had been "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote". Id. at 41.

If these precedents applying the Fourteenth and Fifteenth Amendments are to be taken seriously, the Court cannot allow the creation of the two North Carolina majority-minority districts along racial lines and the segregation of black from white voters. Indeed, the black neighborhoods along Interstate 85, which have been purposely gathered into North Carolina's Twelfth Congressional District, are an American version of the black townships under South Africa's apartheid system. Moreover, although they are whites, Ruth Shaw and Melvin Shimm, the two Appellants registered to vote in that Twelfth District, are in a position like

that of the black voters in Gomillion; they have been purposefully "fenced" out of a district (the Second District) where there is a majority of white voters and "fenced" in a district with bizarre boundaries drawn for the specific purpose of placing in the district enough black voters to assure that a black person will be elected therefrom to the House of Representatives.[7]

This Court has refused to rule heretofore that either the Fourteenth or the Fifteenth Amendment creates a federal constitutional right for a minority group to elect candidates in proportion to its numbers. Thus, in Mobile v. Bolden, 446 U.S. 55, 76 (1980), the plurality opinion rejected the contention that a constitutional right of black voters in

[7]As intended by the Attorney General -- and derivatively intended by the General Assembly -- a black person was elected to Congress in 1992 from each majority-minority district in North Carolina.

Mobile had been violated "because no Negro has been elected to the Mobile City Commission". The opinion emphasized: "The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization." Id. at 75-76.[8] Moreover, the Fifteenth Amendment concerns the right to vote -- rather than to be represented by a person of the voter's own race.

1. The Batson Line of Cases Upholds the Principle that the Constitution is "Color-Blind."

Recently the Court has given new life to the ideal of the "color-blind

[8] In Freeman v. Pitts, 112 S.Ct. 1430, 1447 (1992) the Court commented that, "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." Although this comment was made in the context of school segregation, it seems applicable also to achieving racial balance in the Congress for its own sake.

Constitution" in deciding a series of cases which follow Batson v. Kentucky, 476 U.S. 79 (1976), and involve the race-based use of peremptory challenges in criminal and civil trials. Thus, in Powers v. Ohio, 111 S.Ct. 1364 (1991), the Court ruled that a white defendant could properly invoke equal protection to preclude the prosecutor from peremptorily challenging black jurors because of their race. As the Court explained, Batson had "recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large." Id. at 1368. The Court rejected the view that

> race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all

> persons is no more authoritative today than the case which advanced the theorem. Plessy v. Ferguson, ... It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

Id. at 1370.

Moreover, in upholding in Powers the standing of the white criminal defendant, the Court emphasized that a verdict would not be accepted by a defendant or the community as fair "if the jury is chosen by unlawful means at the outset". Id. at 1372.

In Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991), the Court reached a similar result in ruling on peremptory challenges in a civil trial. Relying on the statement in Powers that racial discrimination in the selection of jurors "'casts doubt on the integrity of the judicial process' and places the fairness

of a criminal proceeding in doubt," Id. at 2080. the Court observed:

> It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.

Id. at 2088.

In Georgia v. McCollum, 505 U.S.___, 111 S.Ct. 2348 (1992), the Court held that the Constitution prohibits even a criminal defendant "from engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges." The Court pointed to the need for public

confidence in the integrity of the judicial system; and presumably the Court concluded that meeting this need was even more important than allowing a criminal defendant the unfettered exercise of his Sixth Amendment right to the assistance of counsel.

Important as is the constitutional right to a jury trial, the right to vote is even more important. Indeed, the "people's" right to vote for members of the House of Representatives -- which has existed since the Constitution was ratified -- is arguably the most important right conferred on American citizens by the Constitution. Therefore, if, in order to maintain confidence in the criminal justice system, a prohibition is imposed on the exercise of race-based peremptory challenges by any party to a criminal or civil trial, no justification can exist for

destroying public confidence in the integrity of congressional elections by deliberately creating race-based majority-minority congressional districts. The creation of such districts is based on the racial stereotype that only a black member of the House of Representatives can properly represent black voters in the Congress. The Court has refused to allow the exercise of a peremptory challenge on the "assumption" that a black juror may be presumed to be partial simply because he is black," Holland v. Illinois, 493 U.S. 474, 484, n.2 (1990).[9] Likewise, the Court should vigorously rebuff the effort of the Attorney General and of the North Carolina Legislature to apply racial "assumptions"

[9] Even a criminal defendant cannot base a peremptory challenge on this type of race-based "assumption". Georgia v. McCollum, supra.

to the electoral process.[10]

2. Creation of Majority-Minority Districts Without Race-Neutral Justification May Lead to Further Racial Division.

Under Batson and its successors, a peremptory challenge may be exercised if -- but only if -- a race-neutral explanation is available. Likewise, a congressional district may be created in which a majority

[10] Appellants Shaw and Shimm are especially injured by being placed in the Twelfth congressional district, which were created because the Attorney General and the General Assembly relied on a racial stereotype or "assumption" that only a black person can adequately represent in Congress the blacks who constitute a majority of the voters in that district. Thus, the black person elected to Congress from the Twelfth District -- as occurred in November 1992 -- may be led to ignore the interests of the white voters in the district because, according to the same stereotype, his duty is to further the interests of black voters. On the other hand, taking its stereotype to the fullest extent, the white Congressmen who have been elected from the ten congressional districts in North Carolina where whites are in a majority, may view their primary duty to be the furtherance of the interests of their white constituents.

of the registered voters are minority persons; but also in this instance there must be a race-neutral explanation available. North Carolina's redistricting plan is per se unconstitutional because not only is no race-neutral explanation available for the convolutions of the boundaries, but the admitted explanation is that these districts are the result of a race-conscious purpose.

If, as Appellees and the court below apparently believe, the purposeful creation of majority-minority congressional districts like the two in North Carolina is authorized by U.J.O., that case is a dangerous relic from the past and should now be formally interred. Even Justice Brennan, who joined in a portion of the plurality opinion in U.J.O., recognized that such redistricting posed several dangers. These dangers have become

increasingly more evident and more serious over the ensuing years.

In U.J.O., Justice Brennan observed that "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." 430 U.S. at 172. On December 8, 1992, this hazard posed by race-conscious redistricting was exemplified when opponents of the recent Ohio legislative reapportionment plan argued before this Court in Voinovich v. Quilter, (No. 91-1618), that the plan was the product of such a "policy" and that the "packing" of black voters under that plan actually lessened their influence. Similarly, in the instance of the Brooklyn legislative reapportionment involved in U.J.O., "Puerto Rican groups (lumped together with blacks as 'nonwhite') protested that the result of

the Justice Department's intervention had been to reduce their political strength from what it would have been under the state's initial plan.' (See Andrew Kull, The Color-Blind Constitution, (1992), p.219.)

Justice Brennan also acknowledged in U.J.O. that:

> even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. ... Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection."

Id. at 173-174.

Creation of the two majority-minority districts in North Carolina was an implicit

affront to blacks because it implied that they are incapable of organizing coalitions to elect favored candidates of whatever race. Cf. De Funis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J. dissenting). Ironically, this implication is false, for black candidates have been increasingly successful in obtaining election to State and local office.

Finally, according to Justice Brennan,

> especially when interpreting the broad principles embraced by the Equal Protection Clause, we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear immediate, direct costs of benign discrimination.

Id. at 174.

Certainly Appellants Shaw and Shimm entertain this "impression of injustice" to which Justice Brennan refers. They and other registered white voters in the Twelfth District feel victimized by having been placed in a majority-minority district drawn with irrational boundaries in order to assure that a white person will not be elected to Congress from that district. They realize that, for the next ten years, their representative in Congress will be black and will consider his primary duty to be the representation of blacks, because that is the very purpose for which the district was created.[11] Moreover, these

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[11] One can only speculate whether white members of Congress elected from other districts will feel any obligation to represent white voters not in their district. Likewise, a black person who wishes to be a candidate from a district which is not a majority-minority district may confront a "backlash" feeling among the white voters of that district that the blacks in North Carolina already have their "share" of seats in the Congress.

Appellants, like many other North Carolina voters -- white and black -- have suffered injury because the lack of compactness, contiguousness, and community of interest in their congressional districts makes it almost impossible for their Representative -- however well-intentioned he may be -- to adequately to represent them.

The majority-minority districts also do great harm to our national goal of an integrated society for a

> racial entitlement to congressional seats is a disincentive for achieving a truly integrated society. In such a society, not even the cleverest computer program could gather blacks (or Hispanics, or any other group) into a district where they are a majority. Imagine, says the newspaper Roll Call, creating a district for twenty-year-olds, and you'll begin to understand the problem.

Will, supra, at 49.

The evils that may result from racial quotas in the electoral process are not of themselves a complete justification for

holding such quotas to be constitutionally invalid. Nonetheless, they tend to substantiate the argument that the purposeful creation of majority-minority congressional districts -- if it were ever authorized by U.J.O. or any other decision of the Court -- is constitutionally prohibited in the 1990's.[12]

Citing a passage in U.J.O.,[13] the

[12] In Freeman v. Pitts, 112 S.Ct. 1430 (1992), the Court made clear that even though a program of affirmative action to combat school segregation may have initially been constitutionally allowable, at some point the justification for the program may cease. Even if, at some point in North Carolina's history, the establishment of majority-minority districts might have been permitted, currently they have no constitutional justification. The redistricting plan generated by the Attorney General and the North Carolina General Assembly was obsolete at its birth and certainly should not be upheld now by the Court -- in which event it will predictably remain in effect until the next decade, the next century, and the next millennium.

[13] "As the Court of Appeals observed, the plan left white majorities in approximately 70% of the assembly and

court below concluded that Appellants, who are all white, had not been injured, because North Carolina's redistricting plan "demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis". (J.S. App. at 23a-24a) However, in U.J.O., there was no majority opinion and the constitutionality of proportional representation by race should not rest on a plurality opinion. Secondly, U.J.O. did not involve elections for members of the United States House of Representatives -- elections which, as the "one-person, one-vote" cases make clear, are entitled to even greater constitutional protection than elections of state

senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." 430 at U.S. 166.

legislators.[14] Most important, insofar as it purports to allow proportional representation by race, U.J.O. is inconsistent with the recent cases invalidating race-conscious government actions.

C. The Voting Rights Act Does Not Provide a Basis for Race-Based Proportionate Representation in the United States House of Representatives

In amending Section 2 of the Voting Rights Act in 1982, Congress enacted a specific proviso that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the

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[14] Thus, in the reapportionment of state legislatures or county boards, the Court has been willing to allow a much greater deviation from equality of voters than would be allowed in congressional redistricting. Compare Karcher v. Daggett, 462 U.S. 729 (1983) with Brown v. Thompson, 452 U.S. 835 (1983) and Abate v. Mundt, 403 U.S. 182 (1971).

population." 42 U.S.C. § 1973b. Thus, it made clear the legislative intent not to recognize any right of minority groups to proportional representation. See S.Rep. No. 97-417, p.2 (1982), quoted in footnote 20 of Chisom v. Roemer, 111 S.Ct. 2354, (1991). Clearly, in light of the proviso, the Attorney General is not empowered to establish such a right on his own. Cf. Presley v. Etowah County Commissioners, 112 S.Ct. 820 (1992) (rejecting Attorney General's construction of Voting Rights Act provision).

Despite the express proviso in Section 2 of the Voting Rights Act, 42 U.S.C. 1973b, Appellees apparently contend that, under U.J.O., the creation of North Carolina's two majority-minority districts is a form of "benign discrimination" which may be required by the Attorney General in the exercise of his preclearance powers

under Section 5 of the Voting Rights Act. However, no constitutional basis exists for Congress to authorize legislation having such an effect.

When construed in light of Article I, Section 2, the power conferred on Congress by Article I, Section 4 does not include the imposition of a system of racially proportionate representation in the House of Representatives. The Fifteenth Amendment concerns the personal right to vote, rather than any group right to representation in the Congress or other legislative body. The imposition of racially proportionate representation in the House of Representatives is outside the purview of Section 1 of the Fifteenth Amendment and, therefore, beyond any authority Congress might have under Section 2 -- which has generally been viewed as the primary source of congressional power to

enact voting rights legislation. Likewise, a law intended to create proportionate representation by race in the House of Representatives would not be "appropriate legislation" within the meaning of Section 5 of the Fourteenth Amendment -- unless the Court takes a new position and decides that the right to vote includes a right to have a candidate elected of the voter's race.

In view of this lack of congressional power to impose proportionate representation by race, there is even greater reason to construe the Voting Rights Act in a way that will not permit the unconstitutional result of allowing the Attorney General to impose a quota system for voting which demeans the race it purports to protect, in many instances dilutes the overall influence of minorities in the political process, and destroys the ideals of our democratic society.

II. NORTH CAROLINA'S TWO MAJORITY-MINORITY DISTRICTS FLUNK THE "STRICT SCRUTINY" TEST.

Even if the Constitution allowed racial group entitlements to seats in Congress, those entitlements should not be awarded without strict scrutiny to determine what abuse they remedy and what need they fulfill.

This conclusion is supported by the Court's decision in Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), which held unconstitutional a racial set-aside program for municipal public contracts. There the Court emphasized the lack of relationship between the beneficiaries of the set-asides and the racial discrimination which was the purported justification for the program. According to the majority in Croson, "strict scrutiny" should be given to the

alleged reason for granting such racial quotas. Thus, the lesson is clear that if the purposeful creation of two districts to elect black members of Congress can be justified at all, that justification must be substantial.[15]

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[15] The Court's decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), does not invalidate this conclusion. Although there the Court upheld racial preferences in the allocation or distress sale of broadcast licenses, these preferences fall short of being quotas. Moreover, such preferences were viewed by the Court as having received congressional approval because of a policy favoring expression of diverse views through the broadcast media; but North Carolina's racial quotas for members of Congress -- especially as implemented by the General Assembly in the redistricting plan -- violate the legislative intent expressed by the proviso in Sec. 2 of the Voting Rights Act, 42 U.S.C. § 1973b. Some conceivable benefit to members of an economically disadvantaged group may result from obtaining a broadcast license; but no comparable benefit to any voter accrues from the creation of majority-minority districts. Most important, in any event, broadcast licenses authorized by Congress in the exercise of its commerce power, Art.I § 8, cl. 3, do not have the same constitutional status as the right to vote for members of the House of

A. This Court's Recent Decision in Freeman Indicates that Strict Scrutiny Must Be Given to Majority-Minority Districts.

Although it deals with school desegregation, rather than voting rights, the Court's recent decision in Freeman v. Pitts, supra, supports the conclusion that efforts to attain racial balance must be justified and subjected to strict scrutiny. There, in allowing the District Court to return partial control of the Atlanta school system to local authorities, this Court explained that

> judicial powers may be exercised only on the basis of a constitutional violation . . . . the nature of the violation determines the remedy.... A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation. 112 S.Ct.

Representatives, which is specifically conferred on "the people" by the Constitution itself. See Art. I, § 2.

at 1445.[16]

Although this language was for the guidance of Federal judges administering desegregation plans, it would seem equally applicable to the exercise of the Attorney General's preclearance power.

In Freeman the Court also noted that the Court of Appeals had erred in ruling that the District Court was required to use "awkward", "inconvenient", and "even bizarre" measures to achieve racial balance in student assignments, when the racial imbalance was not attributable to the prior de jure system but rather to "independent demographic forces", 112 S.Ct. at 1447.[17]

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[16] The Court also stressed that the end purpose must be to remedy the violation and "to restore state and local authorities to the control of a school system that is openly in compliance with the Constitution." Ibid.

[17] "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once

These comments seem quite applicable to the effort by the Attorney General to compel North Carolina officials to enact a "bizarre" redistricting plan.

Up to this point, no one has attempted to demonstrate any relationship between North Carolina's 1992 redistricting plan and any past constitutional violation by the State. Likewise, no "strict scrutiny" has been given to whether having two majority-minority districts for the next decade is a remedy for any abuse or whether this solution creates many new problems.

Whatever the conditions that led the Attorney General some years ago to

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the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic forces." (Id. at 1447). "Where reorganization is a product not of state action but of private choice, it does not have constitutional implications." (Id. at 1448).

determine that 40 counties in North Carolina should be subject to the preclearance requirements of Section 5 of the Voting Rights Act, there has been no judicial or administrative determination, or even any suggestion, that those conditions have any relationship to North Carolina's failure to send a black person to Congress.

The 1990 census reveals that the State's black population -- which is about 22% -- is dispersed extensively across both rural and urban areas.[18] In only five counties does the black population exceed the white. Those counties -- Bertie, Edgecombe, Hertford, Northampton, and Warren -- do not have large populations. Because of the State's "residential

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[18] Appellants have lodged ten copies of the 1990 census information with the Clerk of the Court; and the Court is requested to take judicial notice thereof.

patterns", there is no opportunity to create compact congressional districts in North Carolina in which blacks will be in the majority. See U.J.O., 430 U.S. at 168.

From the beginning of North Carolina's history, its congressional districts have been reasonably compact and contiguous.[19] Until 1992, the only obvious gerrymandering of these districts occurred when, in the wake of Baker v. Carr, supra, the General Assembly adopted a redistricting plan for the 1966 election. In turn, a three-judge District Court invalidated this plan on one-person, one-vote grounds and ordered the State to adopt a new plan whereunder the congressional districts would be

[19] This assertion is supported by maps showing the Congressional districts in North Carolina from the State's beginning up to the present. Appellants have lodged ten copies of these maps with the Clerk of Court; and the Court is requested to take judicial notice thereof.

"compact and contiguous".[20]

In short, no evidence exists that heretofore any racial gerrymandering has taken place in North Carolina in establishing congressional districts. Even though North Carolina heretofore has had no black member of Congress in this century, there is no indication that this resulted from the shape of the Congressional districts or that the North Carolina Legislature has ever considered race in the drawing of congressional districts.

On the other hand, the voters of North Carolina have shown ever-increasing willingness to elect their public officials without regard to race. In the 1992 election a black male, Ralph Campbell, was

[20] See, Drum v. Seawell, 249 F.Supp. 988 (M.D.N.C. 1966), aff'd 383 U.S. 831 (1966). Ruth Shaw, one of the present Appellants, was among those who successfully attacked the 1966 redistricting plan.

elected to be State Auditor. In 1990 a black male, Harvey Gantt, defeated a white opponent in the runoff in the Democratic Primary for the United States Senate and almost defeated a powerful white Republican incumbent, Jesse Helms, in the general election. One of the Defendant-Appellees, Daniel T. Blue, Jr., is black and is the Speaker of the North Carolina House of Representatives; and another Appellee, William A. Marsh, Jr., who is black, now chairs the North Carolina State Board of Elections. Although one election would not be conclusive, cf. Thornburg v. Gingles, 478 U.S. 30, 51 (1986), in North Carolina there is a substantial "track record" of black influence in the political process.

B. The Majority-Minority Districts Cannot Satisfy the Gingles Criteria.

In Gingles, the Court prescribed three "necessary preconditions for multi-member

districts to operate to impair minority voters' ability to elect representatives of their choice," id. at 500. The first condition was that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Presumably the Court also meant that "a single-member district" should be formed with some regard for compactness, contiguousness, and other principles usually applied in creating legislative districts.

As revealed by the census data, in North Carolina the black population is too dispersed to permit the creation of two majority-minority districts with rational boundaries. Indeed, the bizarre boundaries of the Twelfth congressional district corroborate that, because of the size and dispersion of North Carolina's black

population, it is impossible to create a majority-minority congressional district without abandoning all other principles of districting.

The second Gingles condition is that the minority group must be politically cohesive. Appellants are unaware that either the Attorney General or a court has found that this condition exists in North Carolina; but whether it does is immaterial since the other conditions are not.

The third condition concerns absence of "cross-over" by members of the majority group. At least currently, this condition is not met, for in various North Carolina elections there has been a substantial "cross-over vote" by the whites who form 76% of the State's population. Otherwise, with only 22% of the population, blacks could not have enjoyed their election

successes in North Carolina.[21]

In any event, Croson's principle of "strict scrutiny" of racial quotas would require that race-based congressional redistricting not take place until there has been a determination that the Gingles conditions have been met. Appellants believe that neither the Attorney General nor the General Assembly have made any such determination and that no one has even attempted to show that the Gingles conditions apply.

Insofar as U.J.O. is thought to

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[21] The remaining 2% of the State's population is predominantly Native-American. To follow the Attorney General's approach to its logical conclusion would suggest that in every fifth congressional election there should be redistricting to create for that election a majority-minority district of Native-Americans who could then elect a Native-American to serve a term in the Congress. This would more fully assure proportionate representation and help cure the "defect" caused by the failure heretofore of the State to send a Native-American to the House of Representatives.

produce a different result, attention should be accorded to that portion of the plurality opinion which stated that

> ... we think it also permissible for a State, employing sound districting principles such as compactness and population equality to prevent racial minorities from being repeatedly outmoded by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority. (Emphasis Supplied)

430 U.S. at 168.

This language, used in 1977, anticipates in some respects the Gingles conditions. If, because of the numbers and the "residential patterns" of the black population in North Carolina, it is infeasible to create majority-minority districts without violating "sound districting principles such as compactness and population equality", then U.J.O. does

not authorize the creation of such districts.

Appellants have several other observations about U.J.O. First, just as it violates the concept of a "color-blind Constitution," U.J.O. is out of step with cases like Croson which require "strict scrutiny" for any kind of quota. Secondly, the elections involved in U.J.O. were for the New York legislature. They were not elections of members of the United States House of Representatives -- as to which the Constitution makes specific provision and contains special safeguards.[22]

A final distinction of U.J.O. is that it dealt with the apportionment of Kings County, New York, which was subject to Section 5 of the Voting Rights Act because

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[22] As has already been noted, supra n.14, the one-person, one-vote requirement applies much more strictly to congressional elections than to the election of State legislators.

it had not made Spanish language ballots available. On the other hand, Durham County, where all five Appellants reside, is not among the 40 counties in North Carolina to which the preclearance requirements of Section 5 apply. Moreover, Durham is the very county as to which the Court ruled in Gingles that the lower court had erred by ignoring the sustained success of black voters in electing members of the State House of Representatives. This success continues in Durham County up to the present.[23] Nonetheless, Durham County

[23] Both before and after the 1992 election, Durham County has been governed by a board of five county commissioners, of whom three, including the chairman, are black. Of the three members of the State House of Representatives from Durham County, one has been black for many years. Of the two Senators from the district in which Durham County is located, one has been black for many years. The City of Durham, which contains a substantial majority of Durham County's population, has had a black mayor in the recent past and also, for some years, has had several black members on its City Council.

is one of those counties divided by the "serpentine" Twelfth Congressional District, which "gobbles up" black neighborhoods.

Even under its most expansive reading, Gingles should not be construed to authorize such a result. If Appellants and other registered voters in Durham County are to be subjected to a redistricting plan which will place them for the next ten years in a district with bizarre boundaries intended to assure that any member of Congress elected therefrom will be black, the justification, if any, for this plan should first be subjected to "strict scrutiny" by the Attorney General, the General Assembly, and the courts. To require anything less than this in dealing with an important personal right conferred by the Constitution and yet to insist on "strict scrutiny" for racial "set-asides"

in public contracts would be an anomaly. Only if the Court grants relief to Appellants can this anomaly be prevented.

III. THE LEGISLATURE'S DISCRIMINATORY INTENT WAS "INVIDIOUS"

In cases in which relief for racial gerrymandering has been sought under the Fourteenth or Fifteenth Amendments the Court has frequently required the plaintiffs to establish that an "invidious" discriminatory intent existed. See, e.g. Mobile v. Bolden, supra, at pp. 66-67. In U.J.O., New York defended on the ground that its legislative reapportionment of Kings County was designed to meet the requirements imposed by the Attorney General and to assure compliance with the Voting Rights Act. In the present appeal, the Court has now raised the issue of whether the State Appellees are entitled to a similar defense. If this defense is allowed, the result will be to create a

"Catch-22" situation and thereby leave Appellants and other registered voters in similar situations without any legal remedy for egregious violations of their most important personal right in a democratic society.

The injury to Appellants and to other registered voters was initiated by the Attorney General's decision to require that North Carolina have two majority-minority congressional districts. This decision, which was made without any study or scrutiny by the Attorney General, was contrary to Section 2 of the Voting Rights Act and to Article I, Section 2 and the Fifth and Fifteenth Amendments of the Constitution, because the purpose of this Federal officer was to establish a racial quota of two black members of Congress from North Carolina. Therefore, the Attorney General's decision was made with an

"invidious" discriminatory intent, for, as Justice Douglas once explained, any state-sponsored preference to one race over another is "invidious". De Funis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting).

When Appellants made the Attorney General and Assistant Attorney General Dunne parties-defendant in their suit to challenge the redistricting plan, the Federal Appellees moved to dismiss. They successfully contended that, under the preclusion language of the Voting Rights Act, 42 U.S.C. 1973l(b), as interpreted by the Court in Morris v. Gressette, 432 U.S. 491 (1977), the decision by the Attorney General was completely nonreviewable in any kind of suit that could be brought by Appellants or any other injured registered

voters.[24] Thus, the only way to test the legality of the Attorney General's requirement would be a suit filed by the State of North Carolina in the United

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[24] The issue whether the Attorney General could be sued by registered voters was left open in U.J.O. 430 U.S. at 154, n.13. However, the sweeping position of the Federal Appellees is not justified by the preclusion language of § 1973l(b), which refers to injunctive relief and does not mention declaratory relief of the type which Appellants are seeking in their Complaint, as amended. In view of "the strong presumption that Congress intends judicial review of administrative action," see Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1980), any congressional intent to prevent judicial review should be made clear. Johnson v. Robison, 415 U.S. 361 (1974); Weinberger v. Salfi, 422 U.S. 749 (1975). Indeed, to accept the broad construction of § 1973l(b) relied on by the Federal Appellees raises a "serious constitutional question". See Webster v. Doe, 485 U.S. 592, 603 (1988). Moreover, the Federal Rules of Civil Procedure authorize joinder of all parties necessary to assure the relief sought in an action. Unless the Attorney General is a party to an action which contests the constitutionality of a requirement imposed by the Attorney General, he or she can continue to deny preclearance of a plan that does not comply with that requirement and can thereby impede the obtaining of full relief.

States District Court for the District of Columbia.

By their Motion to Dismiss based on U.J.O., the State Appellees have contended that they cannot be sued, because they were simply trying to comply with the Voting Rights Act by acquiescing in the Attorney General's requirement. Even though the State could have sought to avoid this requirement by instituting an action before a three-judge district court in the District of Columbia, this alternative would have involved expense and delay; and so it was not really feasible. According to the State Appellees, their good faith in trying to comply with the Voting Rights Act precludes a court from finding that the race-based legislation was enacted with an "invidious" discriminatory intent.

The result of Appellees' syllogism is that Appellants -- no matter how great the

injury they have suffered -- can obtain no injunctive or declaratory relief for the invasion of their constitutional rights. Thus, for the next decade they will be compelled to endure patiently the painful situation in which they now find themselves.

The Appellees' logic leads to the wrong conclusion, however, because it is founded on a false premise in its interpretation of the term "invidious". Just as the Attorney General's intent was "invidious" because he purposely attempted to establish a racial quota, the intent of the General Assembly was "invidious" when, in deference to the Attorney General, it also acted in a race-conscious manner to create two majority-minority districts for the purpose of assuring that two black persons were elected to Congress from those districts.

Such an interpretation of "invidious" is consistent with the principle underlying the Batson line of cases, which hold that a peremptory challenge cannot be exercised against a juror because of that juror's race. Even a criminal defendant or his counsel is not allowed to challenge a juror peremptorily on grounds of race although the defendant may have a good-faith belief or "assumption" that the chances for acquittal will be greater if the challenged juror does not sit.

Peremptory challenges, however, may be exercised for a race-neutral purpose -- such as the jurors' prior knowledge about the case of their personal acquaintance with the witnesses -- even though this may result in excluding from a jury all the members of a particular race. Cf. Holland v. Illinois, 493 U.S. 474, (1990). The line of demarcation is like that which the

Model Penal Code makes between action taken "purposely" and action taken "knowingly" -- the former usually being more culpable. See American Law Institute Model Penal Code (Official Draft 1962), § 2.02.

Similarly, if congressional redistricting is done for the specific purpose of assuring that a congressional district will elect a representative who is of a particular race, the redistricting is done with an "invidious" discriminatory intent. It makes no difference whether the chosen race is black, white, Native-American, Hispanic, or Asian-American. On the other hand, if a legislature creates a district because of compactness, contiguousness, geographical boundaries, community of interest, or other factors, it is immaterial that a majority of a particular race resides or is registered to vote in that district and that the voters

probably will elect a person of that race to serve in the Congress.

From this viewpoint, the Attorney General's requirement of two majority-minority districts was imposed on North Carolina with an "invidious" discriminatory intent. By acting to implement that requirement -- rather than resisting it to the utmost -- the General Assembly acted "purposely" and thus with an "invidious intent.

There is nothing incongruous about this interpretation of "invidious" which precludes Appellees' good faith defense. Perhaps that defense would have more merit if Appellants were seeking damages in tort against Appellees, rather than only injunctive and declaratory relief.

Appellants' interpretation of "invidious" intent to include purposeful action also prevents an absurd result that

would occur from acceptance of Appellees' contentions. If the Appellees are corect, the Attorney General would have a de facto power to expand the coverage of the Voting Rights Act, even though this Court has made clear that -- whatever respect may be due his views -- the decisions of the Attorney General as to the scope of this Act are not binding, cf. Presley v. Etowah County, supra. Whenever a state decided to accept a requirement for preclearance imposed by the Attorney General -- no matter how outrageous that requirement might be -- any registered voter who sought judicial relief would be confronted by a good faith defense and thrown out of court. To allow procedural rules or strained constructions to become a means for depriving citizens of important constitutional rights does not accord with this Court's recent

jurisprudence.[25]

The question posed by the Court for briefing inquires as to the effect of failure by the State legislature to accede to the plan suggested by the Attorney General. As Appellants have sought to demonstrate, the action of the State Appellees violated several constitutional provisions, because it was undertaken for the purpose of assuring that -- as Federal officials had demanded -- two black persons would be elected to Congress from North Carolina.

Under such circumstances, any requisite "invidious" discriminatory intent was present whether or not the State

[25] For example, in Powers v. Ohio, supra, one reason for upholding a white defendant's standing to challenge the prosecutor's use of peremptory challenges to exclude black jurors was the Court's recognition that otherwise the rights of black jurors to serve would be unprotected, because it would be infeasible for those jurors to sue in their own right.

Appellees accepted fully a redistricting plan suggested by the Attorney General.[26] It sufficed that these Appellees chose to establish proportionate representation by race in the North Carolina congressional delegation. Nonetheless, rejection of a plan suggested by the Attorney General brings more into question whether the State Appellees really were acting in good faith -- especially when the result of their efforts was as bizarre and irrational as the redistricting plan that was finally enacted by the General Assembly.

CONCLUSION

The redistricting plan and the official action which led to its enactment

[26] Appellants have some question as to whether Congress intended for the Attorney General to be suggesting to State officials a plan which he would be willing to preclear. However, Appellants also recognize that in discussions between State and Federal officials the latter might take a broader view of their authority than Congress had ever anticipated.

violate some of the most basic precepts of American democracy. "Purposely" drawing racial lines in defining Congressional districts violates Article I, Section 2 and the Fourteenth and Fifteenth Amendments of the Constitution -- even if this is done purportedly as a remedial measure. However, in North Carolina there had been no related constitutional abuse to be remedied; and the previous absence of black members of Congress from North Carolina resulted not from racial gerrymandering but from minority population dispersion. The purposeful action of the Federal and State Appellees took place with an "invidious" racially discriminatory intent. No good faith defense is available -- whether or not the State Appellees complied with any plan suggested by the Attorney General.

The judgment of the Court below should be reversed; and, since the material facts

are undisputed, the Court should hold that the North Carolina redistricting plan is unconstitutional and should be redrawn.

Respectfully submitted,

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January 21, 1993